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Rafting, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In re: SEA HAWAII RAFTING, LLC, Debtor.	Civil No. 16-00230-LEK-KSC On Appeal from: United States Bankruptcy Court for the District of Hawaii Case No. 14-01520 (Chapter 7)
CHAD BARRY BARNES, Appellant, v. DANE S. FIELD, TRUSTEE, Appellee.	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL; CERTIFICATE OF SERVICE** Related Docket Nos. 14 & 23 Hearing Date: December 5, 2016 Time: 10:30 a.m. Judge: Hon. Leslie E. Kobayashi

REPLY MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL

Dane S. Field, Trustee of the estate of Sea Hawaii Rafting, LLC, and Appellee in respect of this appeal, files this reply memorandum in support of the his motion to Dismiss appeal.

I. INTRODUCTION.

Briefly stated, the appeal was filed from the Bankruptcy Court's Order authorizing the sale of an inflatable "Zodiac" raft, and trailer, used commercially for visitor excursions from the small boat harbor on the Island of Hawaii. The appellant has filed his appellate brief, and the Trustee has filed his answering brief.

By his separate motion, the Trustee has moved to dismiss the appeal as moot, on the independent bases that (i) the authorized sale has been consummated with no stay having first been imposed, and the Bankruptcy Court's order provides, consistent with Section 363(m) of the Bankruptcy Code, 11 U.S.C. §363(m), that unless first stayed, any appeal from the order shall not affect the validity of the sale, Onouli-Kona Land Co. v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th Cir. 1988); Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1423-24 (9th Cir. 1985), and (ii) appellant is without standing to contest the sale, as the Bankruptcy Court has entered orders, from which no appeal has been filed, determining that appellant has no unsecured claim against the bankruptcy estate, and that the appellant's alleged lien claim against the raft is without value. See, e.g., Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.), 177 F.3d 774, 777 (9th Cir. 1999)(constitutional standing requires proof of "injury in fact"); Kekona v. Smith (In re Smith), 98 F.3d 1346 (9th Cir. 1996) (unpublished); Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983)(prudential standing in bankruptcy requires a direct and adverse pecuniary injury).

The appellee cites no exceptions to the statutory authority of Section 363(m), and the cases that implement it, and cites no authorities to establish his standing in light of his failure to appeal from final orders of the Bankruptcy Court determining he has neither an unsecured nor a secured claim against the estate. His arguments are thus irrelevant to the motion. Nonetheless, and though his arguments are somewhat confused, we will attempt to comment upon them, so as not to leave the Court with the impression that there is any merit to them. (Because appellant's arguments run together, it is possible we've missed some – but we nonetheless submit that they fall so short of the mark that they are all without merit and can be rejected.)

II. LEGAL ARGUMENT.

a. The Congressionally Enacted Laws of Bankruptcy Apply In This Court in This Proceeding, Just As They Apply in the Bankruptcy Court.

This proceeding arises within the Sea Hawaii bankruptcy case, on appeal from a sale order entered by the Bankruptcy Court in that case. To the extent the Bankruptcy Court properly entered its orders pursuant to the law applicable in the case, as it has here, its order should be affirmed.

The appellant, however, predicates much of his response upon the premise that bankruptcy law, even when enacted by Congress in Title 11 of the United States Code, such as Section 363 of the Code, which authorizes Bankruptcy Courts (or District courts, when presiding in a bankruptcy case) to sell property of the estate, and Section 363(m), which expressly provides that an appeal from a sale shall not affect the sale if it has not first been stayed, is somehow limited to mere 'land' or "mercantile" transactions, Opposition at 3, not applicable to the claims and interests of 'admiralty' or seaman. The appellant argues the historic roots of the bankruptcy law are different than the historic roots of admiralty. Whatever these roots may be, however, the law in the Bankruptcy Court, and this Court, is that law established in the United States, under the Constitution and the United States Code. As the Court of Appeals has determined, in Onouli-Kona Land Co., 846 F.2d at 1172, and again most recently in Adeli v. Barclay (In re Berkeley), 834

F.3d 1036 (9th Cir. 2016),[1] when, as here, the bankruptcy court under 11 U.S.C. §363(m) has authorized a sale of estate property free of liens and interests, and the property is sold without a stay having first been entered, the appeal cannot affect the sale, and therefor is moot. Id. The appellant has not disputed that the raft was an asset of the Sea Hawaii bankruptcy estate; he does not contend that the bankruptcy court did not make the requisite order, and he does not contend that the sale has not closed. He argues that he *sought* a stay, which was denied, and implicitly admits the obvious – that no stay has been imposed. Section 363(m) is quite clear:

> (m) The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Hence, pursuant to that provision, Onouli-Kona Land Co., and In re Berkeley, *supra*, the appeal is moot. There is no exception under the Code for the sale of a raft. So when appellant is "asking this Court to find that the situation involving a parcel of land is vastly different than a vessel", Opposition, at 4-5, which situation

[1] Inexplicably regarding Berkeley, *supra,* appellant argues it is inapplicable because decisions of the Bankruptcy Appellate Panel are not controlling as precedent upon this Court. The argument has no application here, as Berkeley was a decision by a panel of the Court of Appeals.

allegedly was the cause of appellant's injury, he's just asking the Court to ignore the federal statute and decisional law of the Court of Appeals.

His argument that it is different because the raft was purchased by a company formed by Sea Hawaii's former principal has no merit. In In re Berkeley, *supra*, at *3, the Court of Appeals confirmed that the bankruptcy mootness rule applies even when the sale is to a party to the bankruptcy proceeding, provided that the objecting party has failed to seek and obtain a stay of a sale order pending appeal.

Appellant's argument that United States v ZP Chandon, 880 F.2d 233 (9th Cir. 1989) commends a different result is also without merit. In Chandon, seamen were afforded an admiralty lien for unpaid wages earned *during* a pending Chapter 11 bankruptcy, and so it was consistent with both admiralty law *and* applicable bankruptcy law to recognize their accrued secured claim for unpaid wages. In this case the appellant's injury occurred some two years *prior* to the bankruptcy, and because appellant failed to verify his amended complaint in the District Court before Judge Kay, his inchoate lien failed to attach to the raft. Madeja v. Olympic Packers, 310 F.3d 628, 637 (9th Cir. 2002) (appellants failure to verify their complaint as to claims in controversy deprived the court of *in rem* jurisdiction, and accordingly no lien for the claims could attach to the vessel). Accordingly, Judge Kay and Judge Faris each concluded that appellant's claim did not attach to the raft. Appellant appealed from Judge Kay's ruling, but did not seek or obtain a stay of that ruling. Appellant did not appeal from Judge Faris' ruling. Hence his argument, without merit in any event, is also foreclosed because he has not obtained a stay from either Court's ruling, and in any event because he did not appeal from Judge Faris' final order on that issue.

b. Appellant's Argument that Judge Kay Erred in His Rulings Is Immaterial to This Appeal, and In Any Event Is Without Merit.

As set forth above, Judge Kay, in the separate admiralty action, correctly determined that appellant's inchoate lien upon the raft never attached because appellant failed to verify his complaint, a procedure necessary under Admiralty Supplemental Rule C(2)(a) of the Federal Rules of Civil Procedure and the Madeja case, *supra.*

Appellant gratuitously attacks Judge Kay for alleged "repeated refusal to come up with an amount" of an award for appellant's "maintenance and cure"[2], and contemplates the Court of Appeals telling Judge Kay to "make up his mind already", which appellant contends would allow him a lien upon the raft. Putting

[2] As the Trustee has only made a limited appearance in the case before Judge Kay, and then only since the bankruptcy commenced, we have limited comment on this argument – but from counsel's limited appearance it is our impression that Judge Kay determined that the *amount* of a contested award for "maintenance and cure" required an evidentiary hearing, not merely a submission of appellant's proffered witness declaration. We note our impression for the Court, but do not take a position on the particular procedure required to determine the damage amount.

aside the disrespectful character of his argument, since neither Judge Kay's ruling nor Judge Faris' ruing rested upon absence of a liquidated *amount* of Barnes' claim[3], but rather upon appellant's failure to secure *in rem* jurisdiction so as to have his claim attach, the argument is irrelevant to the issue before this Court.

Appellant's further argument, that he was not required to verify his complaint because other affidavits in the case substituted for the required verification, is also without merit. The Rule requires a verified complaint to establish jurisdiction, and does not provide for exceptions. Indeed in Madeja, *supra*, at 637, the Court of Appeals rejected appellants' similar argument that "their claims should be considered in light of the trial testimony for the purpose of verification." If trial testimony cannot substitute for proper verification, then extrinsic affidavits offer no better substitute.

In any event, neither argument is material to the motion, because neither addresses the consequence under Section 363(m) of appellant's failure to secure a stay of the sales order, and neither addresses appellant's failure to appeal from the Bankruptcy Court's orders determining he was without either unsecured or secured claims against the estate or the raft.

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[3] Incidentally, the Bankruptcy Court provided Barnes an opportunity to establish the amount of his claim, through the expedited "estimation" procedure established under the Bankruptcy Code. Barnes counsel submitted no response to the Trustee's motion to estimate Barnes' claim, and the Bankruptcy Court then entered an order determining Barnes had no such claim. Barnes did not appeal from that order.

c. Appellant's Argument that the Sale Should be Stayed Pending Disposition of the Ninth Circuit's Decision on his Appeal from Judge Kay's Decision is Untimely and Without Merit.

The raft and trailer have been sold to the purchaser, and the stay order had not been stayed before the sale was closed. Appellant now argues that the sale should be "stayed", after the fact, until the Court of Appeals has ruled upon his appeal from Judge Kay's ruling. The argument is irregular in that the matter in this appeal is the merit of the Bankruptcy Court's order, not the merit of the District Court's ruling in another case (although that ruling as well is meritorious). In any event, to request that the transaction should be stayed after the fact is untimely, and for that reason should be denied.

Appellant makes a somewhat disjointed argument that there is a constitutional defect in the Court enforcing Section 363(m) of the Bankruptcy Code, and that Judge Kay incorrectly concluded that he was constrained by the automatic stay imposed by Section 362 of the Bankruptcy Code, because, Barnes contends, these provisions may be enforced by a bankruptcy court, and not by a District Court. What Judge Kay understood, and what appellant fails to understand, is that both the District Court and the Bankruptcy Court enforce the requirements of federal law. Section 362 of the Bankruptcy Code, as well as

Section 363(m) of the Bankruptcy Code, are substantive provisions of federal law, and will be enforced by both District Courts and Bankruptcy Courts. The unrelated questions of jurisdiction to enter final judgments in litigation, as between District Courts and Bankruptcy Courts, as reflected in Stern v. Marshall, 564 U.S. 462, 131 S.Ct. 2594 (2011) and Wellness International Network, Ltd. v. Sharif, --- U.S. --- 135 S.Ct. 1932 (2015), do not bear upon whether bankruptcy law or other law shall apply, but instead upon whether certain cases[4] must proceed to final judgment before a District Court. They offer no support for appellant's misguided argument that if this matter were before a District Court, bankruptcy law or doctrines would not apply. As it is, the Bankruptcy Court deferred to the District Court to determine in the first instance whether the appellant had a lien upon the raft – and the District Court determined, just as the Bankruptcy Court later determined, that the appellant had not perfected a lien upon the raft.

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[4] These cases establish that where a claim is made by a debtor estate *against* a third party, which claim would ordinarily exist at common law or state law, the defending party is entitled, absent consent, to have final judgment determined by an "Article III" Court, that is, by a District Court – although that Court would still be sitting " in bankruptcy". As succinctly stated in Wellness, *supra*, 135 S.Ct. 1932, at 1941 (citing Stern), "Article III prevents bankruptcy courts from entering final judgment on claims that seek only to "augment" the bankruptcy estate and would otherwise exist without regard to any bankruptcy proceeding." (citations omitted.) They have no bearing upon the bankruptcy court's authority to determine the validity or value of claims made *by* third parties against the bankruptcy estate or its property, and do not circumscribe the bankruptcy court's supervision of the bankruptcy stay.

Barnes' attorney concludes in argument that absent the irregular relief he seeks, Barnes will have suffered an injury without a remedy. It's unfortunate that Barnes' suffered an injury. But the attorney misleads the Court. Both admiralty law and bankruptcy law provided remedies. Barnes and his counsel failed to exercise those remedies. Barnes' counsel failed to verify Barnes' amended complaint, thereby denying the District Court jurisdiction over the raft. Barnes' counsel declined to participate in the Bankruptcy Court's estimation procedure established to give litigants an opportunity for expedited determination of their claims. Whether Barnes or his attorney acted prudently is a matter they can discuss among themselves. But the fault did not lie in the District Court's or the Bankruptcy Court's procedures or decisions. And it does not provide cause to set aside a sale which Congress and the Court of Appeals have determined should not, after the fact, be set aside.

III. CONCLUSION.

For the reasons advanced above, because (i) Section 363(m) of the Bankruptcy Code, and Court of Appeals' opinions in In re Berkeley, Onouli-Kona Land Co., and Algeran, establish that the appeal shall not affect the sale, and (ii) appellant has been finally adjudicated by the Bankruptcy Court to have neither an unsecured nor a secured claim against the estate or the raft, and therefore is without standing pursuant to the Court of Appeals' decisions in Duckor Spradling &

Metzger, Kekona, and Fondiller, this appeal should be dismissed.

DATED: Honolulu, Hawaii, November 21, 2016.

/s/ Simon Klevansky
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